STATE OF NEW YORK COUNTY OF ALBANY
CITY COURT CITY OF ALBANY

People of the State New York

-vs-

DECISION / ORDER
File # 14-229046

Daniel Torres

Defendant.

APPEARANCES: OF COUNSEL:

P. David Soares, Esq.
Albany County District Attorney
Albany City Court - Criminal Part
Morton Avenue at Broad Street
Albany, New York 12202

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John R. McFadden, Esq.

HON. RACHEL L. KRETSER

The defendant, Daniel Torres, is charged with overdriving, torturing and injuring animals; failure to provide proper sustenance, a class A misdemeanor, in violation of Agricultural and Markets Law § 353 (hereinafter A.M.L. 353). Defendant allegedly failed to provide proper food and drink to his dog, allowed it to live in rooms with feces and urine-soaked floors, neglected to provide medical care to an open wound on the dog's rear leg, and by doing so caused the dog to be in such ill health it was ultimately euthanized. Defendant moves, by motion filed on November 19, 2014 through his attorney, John R. McFadden, Esq., for omnibus relief. The

People responded through the affirmation in opposition of Steven K. Allinger, Jr., Esq. filed on January 5, 2015. The matter now comes before the Court for a decision.

Motion to Dismiss

Defendant moves for an order, pursuant to CPL §§170.30(1)(a) and 170.35(1)(a) dismissing the information which charges the defendant with overdriving, torturing and injuring animals; failure to provide proper sustenance in violation of A.M.L. 353 on the grounds that the information is facially insufficient and defective.

An information is sufficient on its face when it (1) substantially conforms to the requirements of CPL §100.15, (2) sets forth allegations which "provide reasonable cause to believe the defendant committed the offense charged" and (3) contains non-hearsay allegations which "establish, if true, every element of the offense charged and the defendant's commission thereof." CPL §100.40(1); *People v. Alejandro*, 70 NY2d 133, 517 NYS2d 927 (1987). This third requirement is also known as the "*prima facie* case" requirement. The *Alejandro* Court further held that failure to comply with the *prima facie* case requirement is a jurisdictional defect.

The Court notes that "the *prima facie* case requirement is not the same as the burden of proof beyond a reasonable doubt required at trial." *People v. Henderson*, 92 NY2d 677 (1999). "So long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading." *People v. Casey*, 95 NY2d 354 (2000).

Section 353 of the Agriculture and Markets Law states, in pertinent part:

> A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or

> deprives any animal of necessary sustenance, food or drink, or
>
> neglects or refuses to furnish it such sustenance or drink, or
>
> causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or
>
> who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty,
>
> is guilty of a class A misdemeanor and for purposes of paragraph (b) of subdivision one of section 160.10 of the criminal procedure law, shall be treated as a misdemeanor defined in the penal law. (*breaks not in original*)

The accusatory instrument, signed by Officer Jason Seward, states the following:

> On 07/01/14 at 1112 hours the defendant did deprive the victim (male red nosed tan pit bull) of necessary sustenance (food/drink) for an extended period of time causing the victim become highly emaciated, living in feces and urine covered floors within the entire house. Defendant did also cause unjustifiable injuries to the victims left rear leg (large open wound) by letting the victim live in such bad conditions and not providing proper veterinary care when needed. Said action of the defendant caused the victim to have to be euthanized.
>
> Information is based on complainants observations, conversations with animal control officer Karen Miller and defendants oral admission that the victim is his dog.

In its motion the defense argues that the alleged failure to provide veterinary care and a clean environment does not constitute a violation within the plain meaning of the language of A.M.L. 353 and that there is insufficient evidence to show that defendant was not providing proper food and drink to his dog. The defense also argues that the information is defective because it contains hearsay. In response, the People maintain that the medical neglect is properly characterized as "an act of cruelty" within the meaning of the statute, pursuant to *People v.*

Curcio, 22 Misc3d 907, 910-911 (NYC Crim Ct , Kings Cnty 2008), *aff'd* 39 Misc3d 127(A) (Sup Ct, App Term, 2nd, 11th & 13th Jud Dist 2013). The People also maintain that there is adequate evidence of malnourishment, and that the allegations presented in the information are properly non-hearsay.

The Court notes that while the defense is correct that the plain language of A.M.L. 353 does not reference medical neglect, over the last forty years, courts have consistently found medical neglect to be actionable under A.M.L. 353. Some courts have followed an interpretation, first espoused in *People v. O'Rourke*, which held that "necessary medical attention" can be considered a part of "sustenance, " that is, something that is included in "the supplying or being supplied with the necessaries of life." *People v. O'Rourke*, 83 Misc2d 175, 178-179 (NYC Crim Ct, NY Cnty 1975) (holding that permitting a limping hansom cab horse to continue to work without supplying necessary medical attention constitutes neglect under the statute). By this reasoning, the failure to provide medical care "deprives [an] animal of necessary sustenance." The *O'Rourke* court emphasized the "humanitarian sentiment" underlying its decision,"that domestic animals are in fact considered part of the human community. Thus, they should be treated with respect and given proper care." *Id*. at 181. *See also People v. Mahoney*, 9 Misc3d 101, 103 (Sup Ct, App Term 2d Dept 2005), *lv denied*, 5 NY3d 854 (2005) ("We likewise find that the jury charge defining sustenance to include veterinary care and adequate shelter to maintain the dog's health and comfort properly conveyed the appropriate law."); *People v. Richardson*, 15 Misc3d 138(A), *1 (Sup Ct, App Term, 9th &10th Dist 2007) ("The term 'sustenance,' as set forth in the statute, has been held to be distinguishable from the term 'food or drink' and to include veterinary care and shelter adequate to maintain the animal's health and comfort.").

Other courts, relying on rules of statutory construction, have declined to find that necessary medical care is within the plain meaning of "sustenance." *People v. Walsh*, 19 Misc3d 1105(A) *2-*4 (NYC Crim Ct, NYC Cnty 2008); *People v. Arroyo*, 3 Misc3d 668, 672-675 (NYC Crim Ct, Kings Cnty 2004). However, the prohibition on medical neglect has also been reached through application of A.M.L. 350(2), which defines cruelty as "every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted." Thus, the omission of medical care that causes "unjustifiable physical pain or suffering" can be actionable under the A.M.L 353 provision which prohibits "further[ing] any act of cruelty to any animal, or any act tending to produce such cruelty." *See*, *Curcio supra* at 727-728; *Walsh*, *supra* at *4; see *also People v. Fritze*, 28 Misc3d 1220(A) *5 (Nass Cnty Dist Ct 2010).

Put simply, "the test of cruelty is the justifiability of the act or ommision." *People v. Sitors*, 12 Misc3d 928, 932 (2006), *citing O'Rourke*, *supra* at 178. The court in *People v. Bunt* held that "[t]he question of fact as to whether the act of cruelty and the infliction of pain was justified or whether the injury, maiming, etc., was unjustified is a question to be determined by the trier of facts and based upon the moral standards of the community." *People v. Bunt*, 118 Misc2d 904, 909 (Just Ct Town of Rhinebeck, Dutchess Cnty 1983); see also *People v. Voelker*, 172 Misc2d 564, 569 (NYC Crim Ct, Kings Cnty 1997) ("Whether or not the People can prove that defendant 'unjustifiably' committed these acts is a matter best left to the trier of facts.")

Several courts, interpreting A.M.L. 353 to prohibit omissions that cause unjustified suffering, have denied motions to dismiss where there were allegations of medical neglect in the accusatory instrument. *See Fritze*, *supra* at **5-*6* (severely injured cat abandoned overnight at closed clinic); *Walsh*, *supra at *4* (cat had tumor in paw, ingrown nail, polyp in nose and chronic periodontal, liver and kidney disease); *Curcio* (dog had "mass on rear end" that was identified as a

prolapsed uterus), *supra at* 911. It is notable that in each of these cases the victim animal had a medical condition that was clearly visible to an untrained observer.

The significant exception to these cases, where a court granted a motion to dismiss a charge of alleged medical neglect under A.M.L. 353, is *People v. Arroyo*, 3 Misc3d 668, 679 (NYC Crim Ct, Kings Cnty 2004). In *Arroyo*, defendant refused to provide medical care to his dog, which was terminally ill with an ulcerated mammary tumor, due to “moral beliefs and limited finances.” *Id*. at 679. *People v. Curcio*, a later case decided by the same court, distinguished *Arroyo* on the following grounds. *Curcio supra* at 911. First, the *Arroyo* court was asked to decide on a motion to dismiss on grounds of constitutional vagueness as applied to that defendant, not on grounds of facial sufficiency. *Id*. at 911-912. Second, the decision followed a *Huntley* hearing, and was based on evidence gathered there, including defendant’s moral justifications for inaction. *Id*. at 912. Third, the *Arroyo* court found it significant that defendant’s choice was “not part of a pattern of neglect,” and noted that defendant’s other animals were allowed to remain with him. *Id.*

The *Curcio* court found “that arguments regarding whether the alleged conduct indicates a ‘pattern of neglect’ and whether the animal’s suffering is unjustifiable are ill-suited for resolution on a motion to dismiss for facial insufficiency.” *Id*. The *Curcio* court also recognized that similar challenges to facial sufficiency are found in these types of animal medical neglect cases as are found in child neglect “home alone” cases, and that similarly, “[f]actual issues of this nature render cases of failure to provide medical care to an animal under A.M.L. 353 particularly unsuitable for determination on motion, and except in the most extreme cases, are best reserved for trial.” *Id*., *citing People v. Reyes*, 20 Misc3d 1129 (A), *1 (NYC Crim Ct, Kings Cnty 2008) (holding that determination of a minimum time that a child must be left alone in order to hold a

defendant liable is unsuitable for a motion to dismiss for facial insufficiency).

Fewer courts have addressed the issue of culpability. On its face, "[t]here are no words contained therein requiring a 'culpable mental state' such as intent, knowledge, recklessness or criminal negligence," leaving some courts to conclude that barring clear legislative intent to create an offense of strict liability, "the offense will be deemed to require [a culpable mental state] if one is necessarily involved in the proscribed conduct." *People v. Aricidicono*, 75 Misc2d 294 (Dist Ct, Suffolk Cnty 1973); *but see People v. Arcidicono*, 79 Misc2d 242, 243 (Sup Ct, App Term, 9th & 10th Jud Dist 1974) ("[W]e do not, under the present circumstances, think it necessary to pass upon the issue of whether the subject offense is one of strict liability or mental culpability."). The *Fritze* court simply held that "the Defendant's intent may be established by the Defendant's cognizance of the cat's condition and his failure to maintain medical care for the cat." *Fritze*, *supra* at *5, *citing Richarson, supra*; *O'Rourke, supra*. A recent case identified a provision within the statute itself that would establish there is no requirement of a culpable mental state. *People v. Basile*, 40 Misc3d 44, 46 (Sup Ct, App Term, 2d Dept, 11 th & 13th Jud Dist 2013). The *Basile* court notes that section 43 of the A.M.L. provides that "[t]he intent of any person doing or omitting to do any...act [prohibited or omitted when directed to do so] is immaterial in any prosecution for a violation of the provisions of this chapter." *Id*.

Here, the information contains allegations by the complaining police officer that the defendant caused "unjustifiable injuries to the victims left rear leg (large open wound) by letting the victim live in such bad conditions and not providing proper veterinary care when needed," and that he "did deprive the victim (male red nosed tan pit bull) of necessary sustenance (food/drink) for an extended period of time causing the victim to become highly emaciated, living in feces and urine covered floors within the entire house." The question is whether the officer's direct

observation of the dog's medical condition and emaciation is enough for the information to be facially sufficient. This Court finds that it is.

The direct observation of a large open sore on the dog establishes the element of the statute which prohibits "cruelty to any animal" through the omission of acts which thereby cause unjustifiable pain or suffering. The allegations describe a medical condition that was clearly visible to the officer, and reasonably understood to be painful without treatment. It is significant that the officer's other observations of the dog's conditions—that it was living in rooms filled with its own urine and excrement—indicated a pattern of neglect. Likewise, the direct observation that the dog was "emaciated," within the same indicated pattern of neglect, is sufficient to establish "depriv[ation]… of necessary sustenance" in the form of food or drink under the statute.

The other non-hearsay basis for the factual allegations of the information is defendant's admission of ownership, as "a non-hearsay requirement is met so long as the allegation would be admissible under some hearsay rule exception," and admissions are an exception to the hearsay rule. *People v. Casey*, 95 NY2d 354, 361 (2000). While the statute does not explicitly require ownership, the admission of ownership and the allegations that the animal was found within the defendant's residence tend to show that defendant was "entrusted with the care of an animal." *People v. Richardson*, 15 Misc3d 138(A), *1 (Sup Ct, App Term, 9th & 10th Jud Dist 2007). Inasmuch as intent may be necessary, the intent to omit medical care can be established by the visible nature of the untreated open sore on the dog's leg; defendant could see that medical care was needed, therefore knew it was needed, and did not seek it.

Upon review of the information herein, this Court finds that the information is sufficient on its face, pursuant to CPL §§100.15, 100.40, and as supported by the officer's non-hearsay

direct observation. Accordingly, defendant's motion to dismiss is denied.

<u>Motion to Preclude</u>

Defendant alleges that the People have not complied with the mandates of CPL §710.30 with respect to statements allegedly made by the defendant. In the case at bar, the Court file does not contain a 710.30 notice. The statutory remedy for the People's failure to comply with the statute is preclusion. *People v. Lopez*, 84 NY2d 425, 428 (1994). The People respond that they are not seeking to introduce any evidence against the defendant that falls within the ambit of CPL § 710.30, and maintain the admission of ownership is a "res gestae" statement, "which accompan[ies] and elucidate[s] the criminal transaction." *People v. Fox*, 683 NY2d 805, 811 (Sup Ct Nass Cnty 1998).

A CPL § 710.30 notice does not need to be "a verbatim report of [defendant's] complete oral statement." *People v. Laporte*, 184 AD2d 803, 804 (3d Dept 1992). The purpose of the statute is "served when the defendant is provided an opportunity to challenge the admissibility of the statement." *Id*. Here, defendant's statement at issue is the admission of ownership of the victim animal made to an officer, without any particular language quoted. This statement of defendant was specifically noted on the accusatory instrument as a basis for the complaint. Inasmuch as the accusatory instrument gave sufficient pre-trial notice to the defendant that the People would use the admission of ownership in their prosecution, the purpose of CPL § 710.30, to "provide[] an opportunity to challenge the admissibility of the statement," is served. *Id*. The People have conceded a *Huntley* Hearing, should the defense choose to challenge the use of this statement at trial. Accordingly, the motion is hereby denied.

<u>Motion for a Sandoval/Ventimiglia/Molineux Hearing and</u>

Disclosure Pursuant to CPL §240.43

Defendant has requested that the Court conduct a hearing to determine the admissibility of any prior crimes or bad acts by the defendant. Under *People v. Molineux*, 168 NY 264, 332 (1901), defendant is entitled to a pre-trial hearing to determine the admissibility of uncharged crimes committed by the defendant as part of the People's direst case. Under *People v. Sandoval*, 34 NY2d 371, 373, 357 NYS2d 849 (1974), the defendant is entitled to a hearing to determine the admissibility of prior criminal convictions in cross examination impeachment of the defendant. Under *People v. Ventimiglia*, 52 NY2d 350, 359, 438 NYS2d 261, 264 (1981), defendant is entitled to a hearing on the admissibility of evidence of uncharged crimes which do not directly inculpate the defendant but from which guilt can be inferred. Defendant is also reminded of his duties pursuant to CPL §240.43. Defendant's motion will be granted and the requested hearing held immediately prior to the commencement of jury selection at trial of the underlying charge.

Motion for Brady Material

The defendant moves for an Order pursuant to *Brady v. Maryland*, 373 US 83 (1963). In that case, the Supreme Court held that the People must disclose to a criminal defendant evidence in its possession that is (1) favorable to the defendant and (2) material either to guilt or punishment. This rule rests on the premise that proceedings cannot be fair if evidence is withheld which casts doubt on the guilt of defendant. *See*, *e.g. People v. Vilardi*, 76 NY2d 67 (1990). It is incumbent on the People, as a matter of due process, to ensure that material evidence in its possession that is exculpatory in nature be turned over to defendant. *People v. Novoa*, 70 NY2d 490 (1987). The People are directed to do so as such evidence, if any, comes into their possession.

Motion to Compel Discovery

Defendant moves to compel discovery. Defendant filed a demand to produce on October 23, 2014. The People filed their response on November 7, 2014. The Court finds that the People have complied with the provisions of CPL Article 240. The People are reminded of their continuing duty to divulge discoverable material as it comes into their possession and under their control. Failure to do so may result in preclusion or sanctions at the discretion of the Court.

Motion for Rosario Material

Defendant also requests an order requiring the People to make disclosures pursuant to *People v. Rosario*, 9 NY2d 286. The People are hereby reminded of their duties pursuant to CPL §§240.44 and 240.45. Failure to comply with these statutory mandates may result in sanctions or dismissal as authorized by law.

Further Motions/Renewal of Motions

Criminal Procedure Law §255.20(1) mandates that all pre-trial motions be brought within one set of moving papers within forty-five (45) days of arraignment, and to that extent, defendant's request is denied. Defendant may make such further motions and applications that he can demonstrate he could not, with due diligence, have raised in his original motion papers, and that are consistent with Article 255 of the CPL.

Other Motions

All motions not granted herein are hereby denied. This opinion shall constitute the Decision and Order of the Court. The matter is adjourned to March 31, 2015 at 11 a.m. for a pre-trial conference.

ENTER.

SO ORDERED.

This 26th day of February, 2015
Albany, New York

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Rachel L. Kretser
Albany City Court Judge